No. 22121
No. 22121A

IN THE

United States Court of Appeals For the Ninth Circuit

FOWLER MANUFACTURING COMPANY, a corporation,
Appellant,
v.
H. H. GORLICK and MORRIS GORELICK, co-partners, d/b/a THRIFTY SUPPLY COMPANY; THRIFTS SUPPLY CO. OF EVERETT, INC.; THRIFTY SUPPLY CO. OF SPOKANE, INC.; THRIFTY SUPPLY CO. OF TACOMA, INC.; and THRIFTY SUPPLY CO. OF YAKIMA, INC.,
Appellees and Cross-Appellants,
v.
HOWARD KELLER, KELLER SUPPLY COMPANY, INC., a corporation; MAX ROSEN; and NORMAN MESHER,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEES

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SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Statutes

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ARGUMENT IN REPLY

I. The Word "Price" Means "Net Price" as Used in Robinson-Patman, 15 U.S.C.A. 13(a)

III. Comparison of "Net Price" Extended to Appellees and Cross-Appellees Establish That None of Cross-Appellees Were Favored Over Appellees

Appellant replies to topics I and III, together. It is fundamental, before appellees can successfully maintain a triple-damage action under Robinson-Patman in the case

at bar, it is necessary to establish the prices paid to appellant were in excess of those paid by the cross-appellees, to the appellant. Without such foundation, it is palpable appellees never reach the additional requirements of (1) substantial lessening or injuring competition between the appellees and cross-appellees; and (2) injury to appellees' business or property.

The appellant, in order to demonstrate to the district court the failure on the part of the appellees to carry the burden of establishing they were discriminated against in price, presented figures comparing the "ultimate net prices" charged the appellees, as compared with the "ultimate net prices" charged the cross-appellees. This was primarily accomplished by two methods: First, a comparison of all the discounts and allowances granted to appellees and cross-appellees. Such was done through preparation and introduction in evidence of Exhibits A-13-A and A-13-B. The second was by means of Exhibits A-53 and A-55, analyzing comparative sales made to appellees and cross-appellees by appellant, where there were such comparisons available in the said period during the same month.

The accuracy of A-13-A, A-13-B, is not challenged. The volume of purchases of heater figures, presented in the appellant's brief, pages 28, 29 are not attacked. Exhibits A-13-A and A-13-B contain all discounts, cash, quantity or otherwise as well as all allowances, including the freight allowances. The only omission is the 7½% provided by Exhibit 1.

As between appellees and their largest competitor buy-

ing from the appellant, Keller Supply Company, appellees total credits, calculated on a percentage basis as to total purchases, was greater by 44/100ths of one percent. The details are shown on pages 28 and 29 of the opening brief. The percentage advantage in favor of appellees, established by Exhibits A-52 and A-13-B is not questioned in appellees' brief.

On page 36 of the opening brief it is shown as between the same two large distributors, comparing sales when made in the same month, and subjecting those comparative sales to all the adjustments, Thrifty Supply Company would have paid $1722.15 more for its heaters during the said two-year period if it had been charged the same prices as Keller Supply Company, Inc.

The only criticism aimed at the figures contained on page 36 of the opening brief is that the comparative sales figures set forth therein are taken from Exhibits A-53 and A-55, which were admitted by impeachment purposes only. The exhibits are used to refute the contentions made by the appellees. The District Court used them for the same purposes in its Finding of Fact XVIII (R. 348). The appellees never presented any kind of schedule comparing net prices.

Appellees and appellant, alike, have accepted Finding of Fact XII, printed in full on pages 38 and 39 of the opening brief. It is obvious, under circumstances established by Finding of Fact XII, there must be a comparative study of "net price" before the Court can come to a conclusion as to alleged discrimination. In presenting the case to the District Court, the appellees isolated functions of price, and stated to the Court, in effect; the cross-

appellee Keller Supply Company, Inc., or one of the others, received a designated discount, allowance or credit, and appellees did not—neglecting, in each instance, to indicate allowances, credits or discounts which appellees received, and which cross-appellees did not receive. It was the burden of the appellees to produce such comparisons. It is obvious why the appellees did not, for comparisons would have shown that which was developed by appellant and presented in the opening brief, pages 28, 29 and 36.

In this connection, all invoices and all credit memos issued to appellees and cross-appellees during the entire period involved were brought into court, and were available to and used by appellees during the entire course of the trial. The appellant offered to introduce all invoices and credit memos. The Court felt such would serve no useful purpose as long as they were available for inspection by counsel (Tr. 1156, 1157).

Mr. Robert Garthwaite, employed by the appellees in preparation for the state court case, through court order went into each cross-appellees' place of business and digested every invoice and credit memo issued by the appellant to the cross-appellees, and checked them against vouchers. Appellees had all the information necessary to make a comparative sales study (Tr. 284, 328, 329). Mr. Garthwaite stated:

"Q. All right

"A. I got very fine cooperation.

"Q. From all three?

"A. From all three parties.

"Q. And from Mr. Sinsheimer also?

"A. Very well." (Tr. 329)

Offsetting and equalizing credits:

The appellees, at pages 5 and 6 of their brief, state:

> "Further, reference to appellant's Exhibit A-13-B, which purports to be a comparison of all credits received by appellees and cross-appellees discloses that freight rates were substantially equal. Special allowances and inventory clearances were equal. Warehouse sales and credits were equal. All other credits were equal *except cash discount and the two percent discount commencing December, 1961* and the $1.70 credits in November, 1960 through February, 1961." (Emphasis ours).

The foregoing statement does not harmonize with the analysis of figures set forth in the opening brief at pages 28, 29 and 36.

There are a number of areas where credits are unequal and favor the appellees. These are demonstrated by exhibits hereinafter referred to. Some of the credits favoring the appellees are as follows:

Ex. A-1: Credit memo 321 for $4639.68

Ex. A-20: Ten credit memos which reflect 5 discount on "Chevrons", granted to appellees prior to September 1, 1962, when Keller Supply Company, Inc. first was granted 5% on "Zenith" uprights.

Ex. A-21: Part of which consists of 9 credit memos granting 5% on "Chevrons", 3% and 2% discounts on "Fowlers," granted before September 1, 1962.

***Credit Memo* 321:**

Simultaneously with the payment of a delinquent ac-

count, the appellant granted a singularly large credit for $4639.68 to the appellees.

When Mr. Stevens, Gordon Copeland's superior, heard of this, he was angry (Tr. 577). Harold Gorlick had promised, when the agreement of September 9, 1960 was signed, that appellees would pay their accounts on time. The very terms of the agreement so provided (Ex. 1). Harold Gorlick took a plane to Los Angeles (Tr. 577), presumably at the request of Mr. Milton Stevens. While there he wrote a letter (Ex. A-24), dictated by Mr. Stevens, dated May 19, 1961 (Tr. 573, 574). Mr. Gorlick testified:

"Q. . . . Now, did you, on or about December seventh of 1960 receive a notice that the Fowler Manufacturing Company was changing its terms to one percent?

"A. Yes, I did.

"Q. And did you, after you received that notice, continue to take two percent nevertheless?

"A. Only after I was allowed to do so.

"Q. And you took two per cent up until May 9, 1961, is that true?

"A. Yes." (Tr. 563)

The letter (Ex. A-24), provides in part:

> ". . . We understand that the discount terms are one per cent tenth prox., or net thirty days from the date of invoice, and agree to abide by same."

An indication of the circumstances under which the foregoing was written may be gleaned from the following cross-examination:

"Q. And you did that without any reason or without

any basis with a man you were doing a good deal of business with, is that it?

"A. You want to know the situation that led to that meeting or why that meeting came about? Is that what I understand?

"Q. All right, if you wish to explain it that way, go ahead.

"A. Mr. Stevens had called me prior to that meeting and said that he had just seen the credit of this forty-six hundred dollars and some odd cents and that he was put out on seeing credits, large credits, being issued to Thrifty Supply Company and that this had to stop. He didn't want to see any more in the future. . . ." (Tr. 576, 577).

We agree with the Court, and urged upon the Court, Exhibit A-1, credit memo 321 for $4639.68 was an accord and satisfaction. This did not prevent the item from being used to show what the appellees received and what the cross-appellees received in the way of credits. Such determines the effect on competitive processes—not the name given to the items nor the terminology used.

When there are offsetting credits extended to competitor distributors, they cannot injure a competitor in his business or property.

Exhibits A-20 and A-21:

Keller Supply Company was allowed a two percent trade discount across the board on all of its purchases, excepting "Zenith" uprights (R. 347, 348; Finding XVII), commencing on or about December, 1961. The Court found the appellees, during said period, purchased water heaters for which appellees paid $251,307.83, multiplied

the same by 2% totaling $5,026.16, and allowed the said sum as an item of damage.

During the period from February, 1962 to September, 1962, appellees were receiving 5% on "Chevrons" and sometimes 3%, and sometimes 2% on "Fowlers." We refer to September, 1962, as that is when Keller Supply Company, Inc. received its first 5% discount on its private label "Zenith" (Ex. 13-A). The other cross-appellees did not have any private labels.

Thus, during the period from February, 1961 to September, 1961, while Keller Supply Company, Inc. was receiving 2% across-the-board trade discount, the appellees were receiving these discounts of 5% on "Chevrons" and 3% and 2% on "Fowlers," which were offsetting.

In exhibit A-20, ten of the credit memos of the exhibit refer to invoices dated prior to September 1, 1962, and cover 5% discount on "Chevrons," totalling a credit of $2428.97.

In exhibit A-21, nine of the 17 credit memos refer to invoices issued prior to September 1, 1962, and cover 5% discount on "Chevrons," as well as varying discounts of 3% and 2% on "Fowlers," for a total credit of $602.63.

To offset discounts allowed appellees on "Chevrons" and "Fowlers" during the period from February, 1962 to September, 1962, appellees call attention on page 6 of their brief to a purchase of "Vikings" made by the Keller Supply Company, Inc. It appears this private label was not taken over by anyone. At any rate, the entire number of "Vikings" purchased by the Keller Supply Company, Inc. was 135, with a discount of one dollar on each, totaling $135.00 (Ex. 13-A)—a de minimis figure when

pitted against the 5% discount figures on "Chevrons" sold to appellees between the months commencing with February, 1962 and September 1, 1962, when Keller Supply Company, Inc. had no private brand.

In addition even as to base price, Keller Supply Company was often charged more than appellees for heaters that it purchased from appellant. As an example, we have prepared a schedule—Appendix A—showing a number, but not all of the times where the base price charged Keller Supply Company was in excess of the base price charged appellees. On this schedule is not shown the many purchases where they were both charged the same base price nor the times when appellees were charged higher base prices than Keller Supply Company for the same model heaters. The schedule compares some of the base prices contained in Exhibits A-30 and A-57, A-57-A, A-57-C, A-57-D.

Not one of the exhibits used for comparative figures, exhibits A-53, A-55, A-66, A-13-B, A-20, A-21 take into account in any manner exhibit 1.

II. Availability of a Similar Product Under the Same Terms and Conditions is a Defense to an Alleged Violation of Section 2(a) of the Clayton Act, as Amended

Under this heading the appellees state the following, and nothing more:

> "Appellant at no time offered evidence showing that appellees bought from appellant at a disfavored price when they could have bought from any other manufacturer at favored price. The only evidence on availability offered by appellant was testimony of Mr. Gorlick (Tr. 702, l.19 through 713, l.20). The only evidence in this cause concerning availability

is that appellee, when access to goods at lower prices were available, availed himself of this access. By so doing, he reduced the amount of damages chargeable against appellant.

"Appellant by absence of evidence, failed to present a defense of availability. See *Wholesale Auto Supply Co. v. Hickok Mfg. Co.*, 221 F. Supp. 935 (D.C., N.J. 1963).

"There is no evidence upon which appellant could reach its conclusion that appellees had a wide freedom of choice in water heaters at equally favorable or more favorable prices." (Appellees' Br., pp. 10,11)

In testifying as to the various electric water heaters sold by the appellees from about the inception of their business, Harold Gorlick stated that in 1952 they handled "Abco" water heaters, made by Appliance Building Company (Tr. 6). In 1953 and 1954 they were distributing the "Rheem" water heater (Tr. 6). Then they sold "Northern," manufactured by the Northern House Company, in which company he had an interest (Tr. 7) and then they had General Electric water heaters in 1956 (Tr. 7). In 1957 and 1958 it was "Hot Point" (Tr. 7).

Mr. Howard Keller was called as an adverse witness by counsel for appellees. He testified, in part:

"THE COURT: What about the—

"THE WITNESS: (interposing) Manufacturer?

"THE COURT: (continuing)—the competitive situation from the manufacturer to the distributor?

"THE WITNESS: Right, that is very competitive because there are many manufacturers who are trying to get their share of the market, and naturally they compete very strenuously." (Tr. 392)

Mr. Gorlick testified he always purchased from "Abco"

as well as purchasing at times from others than appellant, during the period involved:

"Q. Who were you ordering from in the latter part of 1962?

"A. Mission Water Heater Company.

"Q. Anybody else?

"A. Well, all right, yes, we were buying some from Abco. We always bought from Abco." (Tr. 707).

Again, he testified:

"Q. Now did you ever handle White water heaters during the period 1960 to 1962?

"A. Yes.

"Q. And have you got your invoices on Whites?

"A. I don't have them with me.

"Q. You have them available, do you?

"A. Let me think. I should have them. Yes, I believe I have.

"Q. Were those prices less or more on 52's?

"A. They were less and I believe I even bought from White water heaters at this $35.50 price on a fifty-two gallon." (Tr. 713).

The foregoing price was much less than those granted to cross-appellees (Ex. A-53, A-55, A-66). Mr. Fred Fowler, former president of appellant, who had terminated his connection with appellant in August, 1961 (Tr. 917, 918) stated the complaints he received from the appellees were not directed to prices appellant was granting to others, but rather as to the prices that were being offered on water heaters manufactured by others:

"Q. Now, the question, however, was directed at Thrifty Supply through Harold Gorlick. What were his complaints?

Were his complaints against manufacturers of products, distributors of manufacturers of products other than Fowler Supply, or were they directed against distributors of Fowler Supply heaters?

Have I made myself clear on that?

"A. I understand your question.

In the water heater industry, because of a particular distributor buying from a particular manufacturer, it does not preclude the fact that the representatives of other manufacturers will from time to time call on that distributor and offer to him or it a program of endeavoring to sell products to that distributor and generally the inducement was price and, if such a procedure took place, we were immediately called and told, "Your price is too high. I have been offered water heaters at such and such a price, which is lower than yours." And, in general, these were the complaints of price competition and pricing, as I recall the complaints.

"Q. Were they made by Harold Gorlick?

"A. Yes.

"Q. And do you remember what particular corporation's products he complained about?

"A. Well, the various ones that I have mentioned, Pioneer, Mission, White and possibly Rheems and General. There may have been others." (Tr. 951, l. 18 through 952, l. 20)

As soon as the $37,500 credit was fully satisfied, as provided by exhibit 1, the appellees purchased elsewhere. They discontinued purchasing from appellant altogether at the end of October, 1962. If the appellees had any worry about a source of supply, it is quite certain they would not have failed to pay for the water heaters they received. They never paid for one heater, ordered after August 21, 1962, until judgment was entered against them

more than two years later, on December 3, 1964 (Ex. A-9).

Before appellees discontinued taking delivery on electric heaters, they commenced buying from the manufacturers of Mission heaters, at a cheaper price. Requests for admissions 44 and 45, read into the record, were as follows:

> "And number 44 on page eight.
>
> " 'Do you admit the ultimate net price, per unit, to you on fifty-two gallon glass-lined water heaters from Mission Corporation during the month of October, 1962, was less than the ultimate net price from Fowler Manufacturing during said month?
>
> " 'Plaintiffs admit same.' " (Tr. 1562)
>
> "Number 45:
>
> " 'Do you admit the ultimate net price, per unit, to you on sixty-six gallon glass-lined water heaters from Mission Corporation during the month of October, 1962, was less than the ultimate net price from Fowler Manufacturing during said month?'
>
> " 'Plaintiffs admit same.' " (Tr. 1562)

On or about January, 1962, appellees bought "General" 52's, at $35.50 (Tr. 712, 713), when the cross-appellees were purchasing the same type heater from appellant for a bare price of $41.90 (Ex. A-29, A-30, A-31). Also during the two-year period the appellees were purchasing "White 52's" for $35.50 (Tr. 713).

The evidence is overwhelming that the appellees had a wide freedom of choice at prices as favorable or more favorable than offered by the appellant to any of the cross-appellees.

IV. Price Discrimination Alone in a Highly Competitive Market Does not Satisfy the Requirement of Robinson-Patman to Establish Effect of Substantially Lessening or Injuring Competition

The appellees came into Court with the thought of establishing a difference in a function of price. If that was all that is required under Robinson-Patman, each party in this type of business would be suing the other continuously. Harold Gorlick characterized the business as a "day-to-day business" (Tr. 702). To us, this means prices were changing frequently. The only practical approach to this type of trading market is as suggested by Commissioner Phillip Elman, quoted in the Washington Law Review and set forth on page 39 of the opening brief. Commissioner Elman advances the proposition where there are price differences which are temporary or sporadic, or where they tend to cancel each other out, such as not likely to produce any harmful effects upon the competitive processes.

The Court found:

> "The electric water heater generally is simple in design, and quite uniform in manufacture. There was little choice between the electric water heaters manufactured by the various companies distributing in the territory served by the plaintiffs and by Keller Supply Company, Mesher Supply Company, and Rosen Supply Company. . . ." (Finding of Fact VII, R. 340)

The foregoing meets the requirements of alternative products as used in *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 356, 18 L.Ed. 1249, 87 S.Ct. 1856 (1967).

Each of the cross-appellees and the appellees sold other water heaters during the period involved. Exhibit A-4 is a good example.

Whenever prices are compared in the evidence, the appellant's prices are higher. The written exhibits, A-3, A-4, A-5 and A-6 all written by Harold Gorlick, refer to other manufacturers selling at lower prices than the appellant.

Mr. Nickoloff and Mr. Fowler were being informed constantly by Mr. Gorlick that Fowler Manufacturing Company was being undersold in the market place (Tr. 1045, 951 ll. 18 to 952, l. 21). Fowler was trying to be competitive with other manufacturers and at the same time survive. It is difficult to demonstrate anything in the evidence the appellant did that would have had the effect in this market of lessening or injurying competition.

V. Appellees Never Demonstrated Any Actual Damages to Their Business or Property Resulting From the Alleged Price Discrimination

We quote from the appellees' brief, at page 9:

> "Appellee met competition by lowering his prices to equal or beat those of his competition, cross-appellees."

There is no evidence in the whole record that any of the cross-appellees dropped their prices on heaters sold to them by appellant at any time during the period involved. It would be most remarkable, if because the appellant changed appellees cash discount rate for a period of time from 2% to 1%, any of the cross-appellees lowered the price on heaters sold to them by Fowler. Secondly, there is no evidence that when Keller or Mesher were receiving 2% across the board, at or about the same time appellees were receiving 5% on "Chevrons" and some-

times 3% and sometimes 2% trade discounts on "Fowlers"; that any of the cross-appellees dropped their prices.

Wherever there is any evidence about prices offered by the appellees to the trade, invariably it leads to the conclusion appellees were at all times underselling the cross-appellees on water heaters manufactured or distributed by appellants, and consequently there was never any occasion for appellees to drop their prices to meet the competition of cross-appellees.

In November, 1960, according to Mr. Gorlick's own testimony, the cross-appellees were claiming they could not meet the prices being offered by appellees on heaters manufactured by appellant:

> "A. They didn't complain to me directly, the factory complained that there were chaotic prices in the three-county area, and we were an instigator or the cause of it, and called a meeting in November of 1960 to discuss that situation. Actually part of this letter of October 27th outlines a policy that refers to this matter when they talked about ghost competition." (Tr. 52, 53).

Mr. Fowler testified to an incident that occurred at the meeting:

> "We sat down around the table and started to discuss the various matters for which the meeting had been called. During the course of the meeting we did discuss competition, price-wise, in general. We discussed the pricing of water heaters as offered by the various distributors to the dealer organization in the Seattle-Tacoma trading area or market.
>
> "During the period of this discussion it was pointed out, I don't recall by whom but it was pointed out by one or two of the co-defendants, that it seemeed

> Thrifty Supply Company had offered water heaters at a very low figure and it was wondered why or how this particular distributor could operate with such a low margin of profit." (Tr. 939, 940).

Harold Gorlick testified in the spring of 1962 other distributors were complaining to appellant about the prices quoted on "Chevron" 52's, at $41.95, by appellees (Tr. 630). He also testified he informed the appellant the reason he was quoting $41.95 was to meet the prices cross-appellees were quoting on "General" water heaters, *not* the appellant's heaters. Keller Supply Company, Inc. and Rosen were purchasing "General" water heaters at prices less than the Fowler Manufacturing Company was selling its water heaters (Tr. 1565, 1568, 1569).

Obviously, cross-appellees could not sell Republic's, the exact duplicate of "Chevrons" except for color trim, for $41.95 and pay a base price of $41.90 (Ex. A-29, A-30, A-31), even if Mr. Keller and Mr. Mesher did receive 2% cash and 2% trade discount.

William Butterbaugh, who worked for the appellees as a salesman until January 1, 1961, stated that he was given exhibit A-59 to show to his customers, which grants a 6% discount for cash. The document was used by him until he resigned (Tr. 1410). The cross-appellees allowed 2% discount for cash—a custom of the trade (Tr. 821).

Appellees never produced one invoice, or price list, or called one salesman as a witness. We believe it is a fair inference such would have established that the appellees were selling at prices which could not be met by cross-

appellees. If the appellees had a desire to do so, and apparently they did, they could use the means provided by exhibit 1, and the 5% on "Chevrons" to create a market advantage for themselves. Very soon after that advantage was eliminated by Keller Supply Company, Inc. receiving 5% discount on its own private brand, on or about September 1, 1962, and the termination of the 7½% provided by exhibit 1, the appellees took their business elsewhere, although they stated in open Court they were claiming no discrimination after August 21, 1962 (Tr. 1121).

Appellees, to meet the criteria promulgated by *Enterprise Industries v. Texas Co.*, 240 F.2d 457, assert in their brief they lowered prices to meet competition of cross-appellees. As support for their contention, on page 9 of the appellees' brief they make reference to transcript 32, 626, 687 and 702.

In reviewing the appellees references, transcript 32 has reference to exhibit 2, a price list issued by Keller Supply Company, Inc. on July 20, 1960, three months beyond the statute of limitations, and almost two months before the appellees obtained the letter agreement of September 9, 1960.

The next reference, 626, contains appellees' statement they are meeting the prices for which cross-appellees are selling "General" water heaters made by the General Water Heater Company. There is nothing in said reference as to any prices cross-appellees were quoting on electric water heaters manufactured or distributed by appellant. The reference is not germane. Exhibit A-4 is reprinted herewith:

[Thrifty Supply Company Letterhead, dated 4/9/62]

"Gordon:

"Here are General's Price as being quoted by

	Rosen	*Mesher*	*Keller*
42 Upright			41.10
52 "	42.50	42.50	42.54
66 "	56.75	54.97	54.54
82 "	75.00	74.80	73.20
50 TU	45.50	44.15	
50 T		67.09	

"These are subject to 2% Cash Discount so $42.50 less .85 cents (2% Cash Discount) is $41.65 . . . that's why we don't move any water heaters at $41.95 net.

"Gordon I went out and verified the market today. That is the pricing in this market today and has been since they acquired General.

"I'll sum up by telling you we will meet competition.

s / HAROLD"

Reference 687 refers to drop shipments on lots of 20 or more. Said reference does not indicate cross-appellees lowered their prices or that the appellees reduced their prices.

The next reference is to page 702. This has to do with competition characterized as "fierce" by the appellees, and a statement that the water heater business is a day-to-day business. There is no statement that cross-appellees lowered their prices, or that the appellees reduced their prices, to meet competition of cross-appellees.

Whenever there is any evidence in the record as to any prices quoted by appellees on the appellant's heaters, they invariably indicate the prices were lower than any offered by the cross-appellees. In no instance, for the two-

year period involved, did the appellees establish that any of the cross-appellees lowered their prices, and in no instance did the appellees prove in any manner they lowered their prices on water heaters manufactured or distributed by the appellant to meet the prices quoted by any of the cross-appellees on heaters manufactured or distributed by appellant. The criteria required to meet *Enterprise v. Texas Co.*, 240 F.2d 457 (2nd Cir., 1957), are wholly lacking.

VI. Splitting a Cause of Action Constitutes a Bar

Appellees' only response to appellant's contention that appellees split their cause of action, is to state appellees had no cause of action in the state court.

In appellees' pleadings in the state court action (Ex. A-7), appellees alleged a cause of action arising out of the same transactions between the parties that are the subject matter of the instant lawsuit. The said cause of action was based upon alleged violations of R.C.W. 19.86 and R.C.W. 19.90, which include legislation comparable to 15 U.S.C.A. §§ 1, 2, footnotes pp. 12 and 13 of the opening brief. The state court's Findings of Fact (Ex. A-8, pp. 6, 7) affirmatively establish that appellees' cause of action, insofar as the state law paralleled 15 U.S.C.A. §§1, 2, was determined adversely to appellees on the merits. The trial court recognized this position in granting partial summary judgment to appellant (R. 74, 349), stating that alleged violations of the state anti-trust statutes comparable to acts forbidden by the Sherman and Clayton Acts were decided adversely to appellees in the state court action. The question to be determined is

whether the fact the first forum offers less relief than the second forum under the same set of facts, should bar a litigant. Appellant contends that the authorities cited in appellant's opening brief (to which appellees failed to respond) establishes that under these facts a second lawsuit should not be permitted.

The state law R.C.W. 19.86.090 allows treble damages for recovery under either R.C.W. 19.86.030 or 19.86.040.

Assuming the appellees in their state court case had been successful and obtained recovery under R.C.W. 19.86.030 or R.C.W. 19.86.040 which two statutes are comparable to 15 U.S.C.A. §§1, 2, the District Court, in our opinion, would not have permitted the appellees to pursue the case at bar.

There is no legal distinction to our knowledge insofar as a bar is predicated on splitting a cause of action, between success and failure in the first forum.

ARGUMENT IN ANSWER TO APPELLEES ON CROSS-APPEAL

I. The Court Erred in Finding the $1.70 Credit Was Included in Credit Memo of May 9, 1961

In late 1960, the manufacturers of "National", "Abco" and "Northern" water heaters were offering to deliver in the vicinity of Seattle directly to the customer in 6-pack, or more, without charge to the distributor (Tr. 929). To offset the cost to the distributor of delivering in 6-pack, the distributor was allowed, for a short period of time, $1.70 per heater (Tr. 929, 930).

The appellees, unlike the cross-appellees, had their own trucks, and chose to deliver with their own equipment and

take a credit for what the auto freight would charge for delivery (Tr. 932, 933) instead of accepting the $1.70 per heater.

As compensating credits for the $1.70 allowed per heater, the appellees were allowed $496.29 to cover the equivalent of freight bills that would have been charged for delivery of those heaters which were qualified under the 6-pack program. This allowance was covered by the issuance of four credit memos, 2048, 2049, 2050, 2051 (Tr. 933; Ex. A-13-A; Ex. A-14).

The appellees admitted the foregoing, but only complained because the program was not extended to Everett in Snohomish County:

> "Thrifty Supply Company of Everett would be excluded from this." (Tr. 44)

The competition of free delivery was not in Everett, so the appellant felt there was no necessity to extend it to that city. Besides, all heaters purchased by the appellees were purchased through their Seattle offices (Finding of Fact I; R. 338). The appellees purchased their Everett requirements on 6-pack, through the Seattle office (Tr. 52). To meet the complaint made by appellees that they should be further compensated to meet the difference in freight rate between Portland, the shipping point of appellant, and Seattle, and between Portland and Everett, the appellees were granted an extra .51 cents per hundred pounds (Tr. 604, 605; Ex. A-14; Credit Memo 1784; Ex. A-13-A). The appellees presented the equivalent of freight on 6-packs; and, it was paid (Ex. A-13-A; Tr. 932, 933).

The 6-pack free-delivery lasted but a short time (Tr.

605, 606, 930). The amount granted to each of the four parties as credits, under the said program was as follows:

Mesher	$ 153.00 (Tr. 931)
Rosen	$ 170.00 (Tr. 931)
Keller Supply Company, Inc.	$ 455.60 (Tr. 932)
Thrifty Supply Co.	$ 496.29 (Tr. 933)

In addition, Thrifty received credit memo 1784, as reflected in exhibit A-14, in the sum of $109.99 to cover the .51 cent freight difference to Everett, Washington.

II. The Court Erred in Finding of Fact XVIII by Finding That Cross-Appellees Received Credits to Offset Drop Shipment From September, 1961 Through August, 1962.

The appellant's sales manager, William Nickoloff, was gratified the appellant was on the eve of acquiring large 40-foot vans (Tr. 1034). The appellant was about to inaugurate a drop-shipment plan, whereby the appellant in lots of twenty or more would drop-ship to the door of the customer of the distributor, without any additional charge (Tr. 1039). Mr. Nickoloff called on the appellees' Harold Gorlick, who at first thought it was a good idea (Tr. 1034). When it was inaugurated, and the appellees did not seem to be using it, he inquired why such was the case, and was informed the appellees did not want the appellant to know who were appellees' customers (Tr. 1035), and were therefore not in favor of the program (Tr. 1035, 1036). Harold Gorlick testified at one point that he was not interested because he did not want the factory to know the names of his customers (Tr. 691). Then, he immediately thereafter testified he did want

the program (Tr. 692). He wrote in a letter dated December 6, 1961:

> ". . . Your programs of drop-off shipments to customers we told you we were not interested in because we didn't want you or anyone else to know who our customers were; is true, but it was just one reason we were not interested in this program. . ." (Ex. 37)

The appellees actually did take advantage of the drop-shipment, on occasion; to Rome Supply (Ex. A-39; Tr. 694, 695) and to Pease & Sons of Tacoma (Ex. A-38; Tr. 693). Harold Gorlick admitted he may have used the drop-shipment program occasionally (Tr. 728).

As far as the record is concerned, the appellees may not have had any other customers who were purchasing in lots of 20 or more water heaters. If they had any besides Rome Supply Company and Pease & Sons, who were purchasing in lots of twenty, or more, appellees have never disclosed who they were, even at the trial of this cause.

Appellees' position is they are entitled to damages calculated on the drop-shipments Keller Supply Company, Inc. made, irrespective of whether appellees had any orders of twenty, or more, that could qualify under the drop-shipment plan, or whether they wanted to take advantage of the program (Tr. 541-545). It is certain the program could not operate without the distributors informing the appellant the places where to deliver the heaters.

> "THE COURT: But you didn't want the drop shipment program.
>
> "THE WITNESS: Yes, we did. As I say—
>
> "THE COURT: (Interposing) Maybe this is in another period. I had in mind those letters." (Tr. 546)

III. The Court Erred in Finding that Cross-Appellees had not *(sic)* Violated 15 U.S.C.A. §13(f)

Appellees admit that the guidelines in determining the quantum of proof necessary to hold a buyer under 15 U.S.C.A. §13(f) are found in *Automatic Canteen Co. v. Federal Trade Commission,* 346 U.S. 61 (1953). In the case cited the Court held, in part, that the commission had the duty of showing the buyer, Automatic Canteen, not only had knowledge of the differential, but also had knowledge that there was no cost justification for the price, as well as other defenses under Section 2(a). In other words, in such case it is incumbent upon the plaintiff to establish, affirmatively:

(1) That the buyer knowingly induced or received a price discrimination of the nature sufficient to establish a prima facie case against a seller under 2(a);

(2) That the buyer knew that he was receiving a discriminatory price;

(3) That he knew the price disparity was not cost-justified or justified under any of the defenses available under 2(a); and,

(4) The burden is upon the plaintiff to establish these facts by a preponderance of the evidence.

None of these elements are present in the instant case.

All of the transcript references used by the appellees to bolster their argument stand only for the proposition that cross-appellees were allegedly receiving something not granted to appellees—not that cross-appellees had any knowledge that appellees were not receiving them.

For example, appellees state that cross-appellees took

2% discount, contrary to the published price position of 1%, from December, 1960, on. Appellees evidently forget that from December, 1960 through May, 1961 they too were taking 2%, and that after August 21, 1962 appellees again took 2%. We fail to see how a deviation from a published price in December, 1960 gives knowledge that a competitor is not allowed this deviation in May, 1961.

Also appellees refer to a 2% trade discount Keller Supply Company, Inc. negotiated in December, 1961, which appellees state was contrary to the pricing policies of appellant. Appellees neglect to mention that during this same period of time they received 5% on "Chevron" water heaters sometimes 3%, and other times 2% on "Fowlers," (Exs. A-20, A-21, A-13-A). In view of this, it is difficult to see why Keller Supply Company, Inc. should think they were getting preferential treatment.

Appellees also spend several paragraphs detailing transactions that took place prior to October 28, 1960, which is beyond the statute of limitations and wholly immaterial.

Appellees advert to the short period of time when cross-appellees received $1.70 per heater under the 6-pack program to meet a competitive situation. At that time, as is previously shown, appellees preferred delivering by their own trucks, and receiving a discount equal to the cost of freight.

Appellees urged this was a day-to-day market. All parties agreed competition was keen. Appellees cannot seriously state that deviation from a published price gives knowledge one is buying at prices less than his competi-

tors, when he himself urged and was the recipient of many such deviations.

The cross-appellees did not know the discounts and allowances which were granted to appellees. How could they know? Certainly the appellees did not tell them. It is very unlikely the personnel of the appellant would inform them. The cross-appellees testified they had no knowledge of the special credits that were allowed to the appellees (Tr. 451, 452, 453, 835, 854).

The cases cited by appellees under 15 U.S.C.A. §13 (f) are so far removed on their facts they have no applicability to the case at bar.

Appellees cited *America News Co. v. Federal Trade Commission,* 300 F.2d 104, in support of their position. The petitioner was a predominant factor in the distribution of magazines. There were two methods of distribution to the public: one, by subscription; the other, through news stands. The petitioner controlled 930 of these outlets. Its closest competitor, A.B.C. Vending Corporation, controlled only 57. Petitioner created a demand for rebates, otherwise indicating to the publishers it would either not distribute the publication, or would make arrangements to not display the recalcitrant publisher's publication—which would seriously hamper the publisher's distribution.

So lucrative was the plan for rebates that out of a gross business of $5,280,000 annually, in the sale of magazines, the petitioner received $890,000.00, in rebates. So potent was the petitioner's position, one of the publishers wrote:

> "I assume if the new rate is unacceptable to us our magazine would not be distributed on your out-

> lets. In view of this situation we have no recourse but to say yes."

The facts of the *America News Co.* case, *supra,* are so gross and culpable as to leave little room for doubt. The instant case, as previously indicated, is not comparable.

In *Automatic Canteen Co. v. FTC,* 346 U.S. 61 (1953) the defendant had extremely potent buying power, and extracted prices as much as 33⅓% better than prices tendered to other buyers. In spite of this, the Court found no violation.

CONCLUSION

Reference to all exhibits and all competent evidence bearing upon the issue of net price comparisons establishes the appellees were the favored buyers.

The overwhelming evidence is that water heaters manufactured by others were always available to appellees, at prices as favorable, if not more favorable, than those granted to cross-appellees by appellant.

The long record in this cause amply establishes the appellees did not sustain any damages by reason of any alleged misconduct or alleged discrimination on the part of the appellant.

Temporary and shifting price differences are almost impossible to avoid in the type of market described by the witnesses, if the normal free market processes are permitted to operate. This type of deviation cannot be harmful unless there be a controlled market by a dominating or cooperative dominating force—a condition not evident in the slightest degree in this case.

The appellees pursued their alleged cause of action in the state court by interposing the same as a permissive counter-claim. The state court made a determination on the merits, adverse to the appellees. Prosecution of the case at bar constitutes splitting a cause of action.

The judgment below should be reversed, and the cause against the appellant dismissed, and the judgment dismissing the cross-appellees affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

L. M. KOENIGSBERG,
Of Attorneys for Appellant and Cross-Appellees

APPENDIX A

Invoice date:	Model:	Number of units purchased:	Base unit price Thrifty:	Base unit price Keller:	Exhibit reference:
Feb. 7, 1961	66-505	6	$56.69		A-57D
Feb. 14, 1961	66-505	16		$65.47	A-30
Feb. 20, 1961	66-505	12		65.47	A-30
Feb. 14, 1961	52-505	16		51.08	A-30
Feb. 24, 1961	52-505	12	46.45		A-57D
Mar. 3, 1961	52-505	12		51.08	A-30
Mar. 30, 1961	52-505	75	46.45		A-57D
Mar. 31, 1961	52-505	75	46.45		A-57D
Oct. 10, 1961	66-109	12		54.53	A-30
Oct. 25, 1961	66-109	2	46.36		A-57
Oct. 27, 1961	66-109	12	46.36		A-57D
Oct. 23, 1961	50-TU-203	24	38.11		A-57D
Oct. 24, 1961	50-TU-203	12	38.11		A-57D
Oct. 31, 1961	50-TU-203	12		42.30	A-30
Oct. 17, 1961	66-203	1	46.36		A-57C
Oct. 17, 1961	66-203	6		51.10	A-30
Oct. 23, 1961	66-203	36	46.36		A-57D
Oct. 24, 1961	66-203	28	46.36		A-57C
Oct. 27, 1961	66-203	12		51.10	A-30
Oct. 31, 1961	66-203	12		51.10	A-30
Nov. 13, 1961	50-TU-203	6	38.11		A-57D
Nov. 14, 1961	50-TU-203	2	38.11		A-57
Nov. 15, 1961	50-TU-203	12	38.11		A-57D
Nov. 20, 1961	50-TU-203	6	38.11		A-57C
Nov. 21, 1961	50-TU-203	10		42.30	A-30
Nov. 27, 1961	50-TU-203	12	38.11		A-57D
Nov. 30, 1961	50-TU-203	20		42.30	A-30
Nov. 9, 1961	66-203	34		51.10	A-30
Nov. 13, 1961	66-203	12	46.36		A-57C
Nov. 13, 1961	66-203	3	46.36		A-57D
Nov. 15, 1961	66-203	24	46.36		A-57D

Invoice date:	Model:	Number of units purchased:	Base unit price Thrifty:	Base unit price Keller:	Exhibit reference:
Nov. 16, 1961	66-203	42		51.10	A-30
Nov. 20, 1961	66-203	12	46.36		A-57C
Nov. 20, 1961	66-203	12	46.36		A-57D
Nov. 21, 1961	66-203	10		51.10	A-30
Nov. 24, 1961	66-203	30		51.10	A-30
Nov. 27, 1961	66-203	12	46.36		A-57D
Nov. 13, 1961	40-TU-203	6	36.04		A-57C
Nov. 14, 1961	40-TU-203	2	36.04		A-57
Nov. 20, 1961	40-TU-203	6	36.04		A-57C
Nov. 21, 1961	40-TU-203	10		$40.10	A-30
Nov. 24, 1961	40-TU-203	15		40.10	A-30
Nov. 30, 1961	40-TU-203	5		40.10	A-30
Dec. 7, 1961	66-203	35	46.36		A-57D
Dec. 14, 1961	66-203	8		51.10	A-30
Dec. 29, 1961	66-203	12	46.36		A-57C
July 19, 1962	52-203	75	40.90		A-57D
July 23, 1962	52-203	84	40.90		A-57C
July 23, 1962	52-203	36		41.90	A-30
July 24, 1962	52-203	14		41.90	A-30
July 26, 1962	52-203	5	40.90		A-57C
July 26, 1962	52-203	36	40.90		A-57D
July 31, 1962	52-203	24		41.90	A-30
July 16, 1962	52-109	68	40.90		A-57D
July 19, 1962	52-109	10	40.90		A-57A
July 20, 1962	52-109	90	40.90		A-57D
July 23, 1962	52-109	24	40.90		A-57C
July 23, 1962	52-109	20		41.90	A-30
July 26, 1962	52-109	23	40.90		A-57C

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